

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 408X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY—ABANDONMENT EXEMPTION— IN HAMILTON AND MERRICK COUNTIES,
NE

Decided: April 21, 2004

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon a 15.60-mile line of railroad between BNSF milepost 1.90, near Aurora, and milepost 17.50, near Central City, in Hamilton and Merrick Counties, NE. Notice of the exemption was served and published in the Federal Register on March 22, 2004 (69 FR 13349-50). The exemption was scheduled to become effective on April 21, 2004, but on March 10, 2004, The Garden City Western Railway, Inc. (GCW), filed a notice of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) to purchase the entire line. The filing of the notice of intent had the effect of staying the effective date of the exemption for 10 days (until May 1, 2004). GCW's OFA would be due by April 21, 2004 (49 CFR 1152.27(c)(2)(ii)(B)), but, in its March 10 filing, GCW also requested that the Board toll the period for GCW to submit its OFA for an additional 30 days to provide GCW with an opportunity to review and analyze the material provided by BNSF and submit its OFA. The Board normally entertains requests to toll when an abandoning railroad has failed to provide a potential offeror promptly with the information necessary to the development of its OFA. While it appears from GCW's filing that BNSF has provided GCW with the information it needs (and evidently had done so prior to the Board's publication of notice in this proceeding), BNSF has not objected to GCW's request to toll the due date for filing an OFA. Accordingly, the due date for GCW's OFA will be extended until May 21, 2004, and the effective date of the exemption will be postponed until May 31, 2004.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on March 26, 2004. In the EA, SEA recommended that the following conditions be imposed on any decision granting abandonment authority. SEA states in the EA that the National Geodetic Survey (NGS) has identified one geodetic station marker that may be affected by the proposed abandonment. Therefore, SEA recommends that BNSF consult with NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers.

SEA also states that the Nebraska Department of Environmental Quality (NE DEQ) has submitted comments stating that the NE DEQ's regulations require a permit for projects that involve the

disturbance of one acre of land or more anywhere in the United States. Accordingly, SEA recommends that, before beginning any salvage activities on the line, BNSF consult with NE DEQ to determine if a stormwater general permit is required.

To address the concerns raised by the U.S. Fish and Wildlife Service, Nebraska Field Office (USFWS), SEA recommends in the EA that BNSF consult with USFWS: (a) if salvage activities are planned in the vicinity of the BNSF Platte River bridge during the Federally threatened piping plover and endangered least tern nesting season, which is from April 15 through August 15, to determine if those species will be affected; (b) pursuant to the provisions of the Migratory Bird Treaty Act, 16 U.S.C. 703-12, if the proposed abandonment project is planned during the nesting season, or at any other time that may result in the taking of nesting migratory birds, so that a qualified biologist can conduct a field survey during the nesting season to determine the presence of nesting migratory birds, and document and maintain on file for potential review by the USFWS the results of the field surveys, along with information regarding the qualifications of the biologist(s) performing the surveys; and (c) before beginning salvage activities, regarding the potential impacts that the proposed project might have on aquatic habitats, streams, and riparian habitats.

Additionally, to address the concerns raised by the Nebraska Game and Parks Commission (NGPC), SEA also recommends in the EA that BNSF consult with NGPC: (a) before beginning any salvage activities that may adversely affect the following Federally threatened or endangered species: bald eagles (*Haliaeetus leucocephalus*); interior least tern (*Sterna antillarum*); piping plover (*Charadrius melodus*); and whooping crane (*Grus Americana*), and regarding the recommendation that BNSF conduct a survey for those species before beginning any salvage activities; (b) to determine the potential impacts to the whooping cranes and sandhill cranes, requiring BNSF to restrict salvage activities to before or after the spring migration, which is from February 15 to April 15, and to suspend salvage activities if whooping cranes are sighted in the wetlands, but permitting BNSF to resume salvage activities once the cranes have left the area; and (c) concerning the removal and salvage methods used when storing construction equipment, mitigation practices to be used during salvage activities to avoid soil erosion, and the revegetation of the right-of-way with certain flora.

SEA further states that the Nebraska State Historical Society (the State Historic Preservation Office or SHPO) has submitted comments stating that no historic properties would be affected by the proposed project. However, SEA recommends that BNSF contact the SHPO immediately if any archaeological remains are uncovered during the project activities.

Comments to the EA were due by April 12, 2004. No comments were received by the due date. Accordingly, the conditions recommended by SEA in the EA will be imposed.

SEA also indicated in the EA that the right-of-way may be suitable for other public use following abandonment. On April 12, 2004, a request for issuance of a notice of interim trail use (NITU) was filed on behalf of the Nebraska Trails Foundation, Inc. (NTFI), and the Central City Community Trails Committee of Central City, NE, for the entire line under the National Trails System Act, 16 U.S.C. 1247(d), and for a public use condition under 49 U.S.C. 10905, in order to negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail. By letter filed on April 15, 2004, BNSF states that it is willing to negotiate with NTFI for interim trail use. The requests for issuance of a NITU and a public use condition will be held in abeyance pending completion of the OFA process.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on March 22, 2004, exempting the abandonment of the line described above, is subject to the conditions that BNSF shall: (1) consult with NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers; (2) consult with NE DEQ to determine if a stormwater general permit is required; (3) consult with USFWS (a) if salvage activities are planned in the vicinity of the BNSF Platte River bridge during the Federally threatened piping plover and endangered least tern nesting season, which is from April 15 through August 15, to determine if these species will be affected; (b) pursuant to the provisions of the Migratory Bird Treaty Act, 16 U.S.C. 703-12, if the proposed abandonment project is planned during the nesting season, or at any other time that may result in the taking of nesting migratory birds, so that a qualified biologist can conduct a field survey during the nesting season to determine the presence of nesting migratory birds, and document and maintain on file for potential review by the USFWS the results of the field surveys, along with information regarding the qualifications of the biologist(s) performing the surveys; and (c) regarding the potential impacts that the proposed abandonment might have on aquatic habitats, streams, and riparian habitats; (4) consult with NGPC (a) before beginning any salvage activities that may adversely affect the following Federally threatened or endangered species: bald eagles; interior least tern; piping plover; and whooping crane, and regarding the recommendation that a survey be conducted on those species; (b) to determine the potential impacts of the abandonment to the whooping cranes and sandhill cranes, requiring BNSF to restrict salvage activities to before or after the spring migration, which is from February 15 to April 15, and to suspend salvage activities if whooping cranes are sighted in the wetlands, but permitting BNSF to resume salvage activities once the cranes have left the area; and (c) concerning the removal and salvage methods used when storing construction equipment, mitigation practices to be used during salvage

activities to avoid soil erosion, and the revegetation of the right-of-way with certain flora; and (5) contact the SHPO immediately if any archaeological remains are uncovered during the project activities.

3. The time period for GCW to file an OFA is tolled until May 21, 2004.
4. The effective date of the abandonment exemption in this proceeding is postponed until May 31, 2004.
5. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary